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IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

PLAINTIFF'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATE OF NEW HAMPSHIRE

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INTRODUCTION

At issue before the Court is the question of whether New Hampshire should be permitted to present historical and legal evidence to the Court pertaining to the meaning and construction of the 1740 boundary decree. The United States contends that the doctrine of *res judicata* bars New Hampshire from introducing evidence that shows the actual jurisdictional boundaries during the colonial period, and which New Hampshire asserts is the best evidence of the meaning and intent of the 1740 decree. The United States argues that this Court's entry of the 1976 consent decree precludes New Hampshire from claiming that the 1740 boundary decree did not establish a boundary dividing Piscataqua Harbor and River, and that the Court's approval of the consent decree in the 1976 lateral marine boundary case conclusively adjudicated the meaning of the language in the 1740 boundary decree. Neither argument is persuasive.

With respect to the United States' argument based on the 1976 consent decree, there is no evidence in the record of the 1976 lateral marine boundary case that supports the United States' claim that the issues presented in this case were actually adjudicated in 1976, and there is no evidence that New Hampshire and Maine intended the decree to have preclusive effect. As to the 1740 Decree, New Hampshire has not disavowed its relevance to its boundary claim. Rather, New Hampshire submits that inquiry into the meaning of the 1740 boundary decree is historically and legally complicated and requires, for its resolution, a fully developed record to permit an accurate construction of the relevant instruments. Unlike the 1976 boundary proceeding in which the master discounted the relevance of evidence of custom and usage in construing the meaning and intent of the 1740 boundary decree as applied to the marginal sea boundary, the dispute in this case involves inland waters where the exercise of New Hampshire's jurisdiction is pro-

bative of the meaning of the royal charters and other instruments defining its colonial bounds. *See* New Hampshire's Brief in Support of Motion for Leave to File (hereinafter "Initial Brief") at 8, n. 16; New Hampshire's Reply to Def.'s Brief in Opp. (hereinafter "Reply Brief") at 10, n. 16. As the United States itself acknowledges, "When the Colonies declared their independence and became States, each asserted sovereignty within the territorial limits of what it perceived to be its boundaries, relying on the royal charters and patents that had defined the colonial bounds." Brief for the United States as Amicus Curiae (hereinafter "U.S. Brief") at 11. New Hampshire's evidence that it operated, regulated and controlled the Piscataqua River and the Port of Piscataqua is legally significant in ascertaining the meaning and intent of the 1740 boundary decree as applied to New Hampshire's inland waters because it reflects New Hampshire's, Massachusetts' and the Crown's contemporaneous understanding of the 1740 boundary decree.[1]

I. FULL CONSIDERATION OF THE HISTORICAL AND LEGAL CIRCUMSTANCES IS REQUIRED TO DETERMINE THE MEANING OF THE 1740 DECREE.

The assertion by the United States that issue preclusion should prevent New Hampshire from arguing that the 1740 boundary decree does not apply is based on a mis-

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[1] New Hampshire has presented clear and undisputed evidence that after the issuance of the 1740 decree and following its independence, it explicitly asserted exclusive jurisdiction over the entire river. *See e.g.*, Letter from Eleazer Russell, New Hampshire Naval Officer, to Mesech Weare, President of New Hampshire (June 10, 1782), 18 N.H. State Papers 716 (Isaac Hammond, ed., 1890) ("New Hampshire hath always possessed jurisdiction over the river.") *See generally* New Hampshire's Initial Brief at 8-20, New Hampshire Brief in Opposition to Defendant's Motion to Dismiss (hereinafter "N.H. Opposition") at 5, n.9, 17-19, nn.35-37.

characterization of New Hampshire's position. The United States describes Maine's position as based on the "historical record" and New Hampshire's claim as based on "subsequent events that now place that boundary at Maine's shore." U.S. Brief at 14. In fact, New Hampshire has consistently argued that the proper interpretation of the 1740 order does not imply the division of the navigable waters or islands in the harbor, and has focused on those aspects of post-1740 governmental activity that reflect New Hampshire's, Massachusetts' and the Crown's contemporaneous understanding of the location of the boundary as confirmed by the 1740 boundary decree. Maine, on the other hand, has primarily relied on historical events and descriptions of the boundary occurring well after New Hampshire's entry into the Union, which supposedly support its construction of the 1740 boundary decree. The United States' characterization of the parties' arguments, particularly its suggestion that Maine relies on the contemporaneous intent of the 1740 order and New Hampshire on subsequent changes to the boundary occurring after 1740, is a reversal of the actual positions of the parties.[2]

The United States also mistakenly suggests that the Special Master and Maine share the same view of history, and that New Hampshire's view of history deviates from this purported "common understanding."[3] This is clearly not the case. Maine has advanced two different historical constructions of the 1740 decree, neither of which accords with the Special Master's recommended division by geographic middle. Division by geographic middle is entirely different, and produces a radically different result, from the principles of division espoused by Maine, division by the navigational

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[2] *See, e.g.*, New Hampshire Brief in Support of Motion for Leave to File at 12 (New Hampshire's boundary claim is based in part on the 1740 boundary decree respecting the boundaries between Massachusetts and New Hampshire).

[3] *See* U.S. Brief at 14 ("Like Master Clark, we believe that Maine's view of the historical record is the correct one.").

channel in 1976 and the thalweg in this case. These principles of division represent three competing "historical" constructions of the decree which produce substantially different results. For example, were the Special Master's view the correct one, division by geographic middle would place the greater part of Seavey's Island in New Hampshire.[4]

The United States contends that New Hampshire should not be permitted to introduce historical and legal evidence that is probative of the contemporaneous understanding of the decree and that is required to ascertain the correct historical meaning of the 1740 order because New Hampshire is "bound by the text of the 1740 order, which sets the boundary at the 'Middle of the River'."[5] It is well established

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[4] *See* New Hampshire Map Lodging No. 4. Although measurements taken from James Grant's 1774 *Map of Piscataqua Harbour and the Town of Portsmouth* indicate that at the closest points, Seavey's Island was approximately equidistant from the District of Maine and the Province of New Hampshire (Newcastle), the greater area of Seavey's Island falls on the New Hampshire side of the center line. The 1693 Charter of Newcastle places Newcastle in the Province of New Hampshire. Charter of the Town of New Castle, 2 New Hampshire Provincial Papers 107 (Nathaniel Bouton, ed., 1868). James Grant's topographical surveys were incorporated in W.F.B. desBarres *Atlantic Neptune*, authorized by both the Royal Navy and the Board of Trade. Grant's privately printed *Map of Piscataqua Harbour* is drawn from his official surveys.

[5] Unlike Maine, the United States contends that the 1740 order was not a judicial judgment, and was not preclusive on the tribunal which rendered it at the time it was made. The United States relies on decisions of this Court for the proposition that the king did *not* act as judge, that decisions of the king in council were *not* judicial judgments, and that the king could "unmake" as well as make boundaries in his overseas dominions. U.S. Brief at 10, 11. This contention should logically compel denial of Maine's motion to dismiss to the extent it relies on the supposed *res judicata* effect of the 1740 order in council. The United States, however, conflates the distinct issue of the *power* of the king in council to determine boundaries with the *nature* of the decision taken. Power itself does not implicate the distinctive principles of interpretation and derivative consequences that flow from a judicial judgment. The United States points out that administrative agency decisions are sometimes given *res judicata* effect, but this is because an administrative

that the meaning of the terms and language in a order establishing a provincial boundary must be construed in accordance with contemporary usage. *Vermont v. New Hampshire*, 289 U.S. 593, 604 (1933). To determine what the terms and language of the order meant in 1740 requires that full consideration be given both to the meaning of the language and to the historical and legal circumstances surrounding the issuance of the order. Although the United States submits that such an examination is unnecessary because the meaning of the language used in the 1740 decree is apparent from the text, it fails to address New Hampshire's construction of the language of the decree,[6] as well as New Hampshire's demonstration that its own inter-

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[5] *Cont.*

agency is acting in a quasi-judicial role. Conversely, the king, although having the highest judicial dignity, did not act in a judicial role when deciding colonial boundary disputes involving non-proprietary colonies in council.

[6] As argued previously, the boundary commissioners, if they used the term "middle" with reference to a definite geographical concept, most likely intended to refer to the main branch of the Piscataqua River or to the non navigable portion of river. Both the 1766 Boundary Report, prepared by Massachusetts, and the 1828 Boundary Report, prepared by the New Hampshire and Maine boundary commissioners, use the words "main" and "middle" interchangeably when discussing the boundary. The 1766 Massachusetts Report states that according to the Jeffrey plan, "it appears that the river, there laid down, runs north northwest ... which exactly agrees with the *middle or main branch*, and is what this Province claims to ...." (Maine Reply Brief at Supp. App. 2a) (emphasis added). The 1828 Boundary Commission Report in describing Massachusetts' claim states, "It was contended on the part of Massachusetts, that what they term the *middle or main branch* should have been taken by Bryent instead of the eastern branch, upon the allegation, that it was a larger stream, and the testimony of Captains Gowing and Warren was taken to support this allegation" (emphasis added). (Maine Appendix at 118a). In 1828, when the New Hampshire and Maine boundary commissioners resolved the longstanding dispute concerning the Salmon Falls portion of the Piscataqua boundary, the Commissioners described the eastern boundary between New Hampshire and Maine as passing up "through the mouth of Piscataqua harbor, and up the middle of the river of Newichwannock, part of which is now called

pretation of the language is the only construction consistent with the authority of, and actual scope of issues presented to, the boundary commissioners,[7] the nature of proceedings on appeal to the Privy Council, the constitutional constraints on the expression of the crown's will with respect to the government of ports in the colonies, and the particular manner in which issues concerning the jurisdiction of colonial governments over navigable rivers and islands therein were actually resolved.[8]

The United States argues that this Court need not consider New Hampshire's evidence because "whatever the location of the 'Middle of the River,' it cannot possibly be

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[6] *Cont.*

the Salmon Falls and through the middle of the same to the farthest head thereof." Although purporting to quote the 1740 decree, the specific changes suggest an understanding of the language as pertaining to the identity of the boundary stream rather than to the location of the boundary within the stream. *Cf. Bailey's English Dictionary,* London (16th ed. 1755) ("Main, the Middle of the Sea or Land.")

[7] *See* New Hampshire Brief in Opposition at 12. (Boundary commissioners lacked authority to alter governmental rights to the port and harbor that rested with the Crown). *See also* letter from Lord Hillsborough to Governor John Wentworth, July 11, 1772, U.K. Public Record Office, C.O.5/937/F.249, App. 38a, responding to Governor Wentworth's request for the appointment of boundary commissioners to adjudicate the boundary dispute between New York and New Hampshire ("The appointment of Commissioners for the Adjustment of the Boundary Line between New Hampshire and New York would be equally improper, and as I conceive unprecedented, in a case where the Soil of both Provinces belongs to the Crown"). The United States cites no authority supporting the proposition that logically must follow from its construction of the 1740 boundary decree; *e.g.* that the boundary commissioners had authority to conclusively adjudicate a boundary dividing a navigable river and port where the rights of soil belonged exclusively to the King.

[8] To construe the 1737 boundary report as dividing the Port of Piscataqua conflicts with English law concerning ports, the jurisdiction and authority of the boundary commissioners and the statutory power of the Treasury. *See* New Hampshire Initial Brief at 24; New Hampshire Reply Brief at 2 (Privy Council lacked authority to assign part of a port or territory within the port to Massachusetts).

at the low-water mark of the Maine shore." U.S. Brief at 20. This blanket assertion necessarily follows from the United States' cursory treatment of the textual complexity of the 1740 order. The United States makes no attempt to reconcile its conclusory treatment of the language of the order with contemporaneous historical evidence including a surveyed map prepared at the request of the Massachusetts boundary commission in 1763 that shows precisely the boundary now claimed by New Hampshire.[9] *See* New Hampshire Brief in Opposition at 13-14.

Importantly, the United States' argument merely assumes that the boundary commissioners, and the King in Council by affirming that part of their report, intended to describe the placement of a line at a particular position within the harbor waters. But this is one of the basic issues in dispute and is an issue on which the United States has essentially

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[9] Subsequent to the filing of New Hampshire's Brief in Opposition, New Hampshire has inspected the original manuscript of the Gowen and Warren 1763 map, a portion of which was copied and included in the appendix to the Reply Brief at 20a. The original map, located in the Maine Historical Society (App. at 1a), uses a pricked line (*i.e.*, a line indicated by holes pricked through the paper) to delineate the boundary between New Hampshire and Maine. The line diverges into two lines along the upper part of the Salmon Falls River to indicate the then-disputed part of the boundary. A facsimile of the pricked lines as seen on the verso of the manuscript is included in the appendix hereto at App. 2a. As can be seen, the boundary is carefully traced along the Maine shore of Piscataqua harbor. The line runs around Gerrish Island, which because of its position was considered to be on the Maine side of the mouth of the Piscataqua, but excludes the other harbor islands. Gowen and Warren produced this map for a committee appointed by the province of Massachusetts Bay in connection with boundary proceedings initiated by Massachusetts to contest the upper portion of the Piscataqua River boundary in the vicinity of the Salmon Falls River. While Maine (Reply Br. at 9) attempts to undermine the significance of this map by pointing out that the surveyors were employed to survey the northern part of the line, the fact remains that the entire river and placement of the boundary is carefully depicted, and this is the only known graphical representation of the position of the line prepared by an official provincial surveyor acting for a boundary committee.

no new evidence or analysis to offer.[10] U.S. Brief at 2, n.1. Ironically, while the United States now emphatically contends that the meaning of the 1740 decree is apparent from the text, and no meaning other than a division of the harbor could have been intended, the federal government historically identified and treated Portsmouth Harbor as a single, undivided geographical entity located wholly within the state of New Hampshire. The boundaries of Portsmouth Harbor, New Hampshire as recognized by the federal government from the 18th century into the 20th century extended to the Maine shore.[11]

Unlike New Hampshire's construction, the interpretation suggested by the United States is completely implausible. No evidence has been proffered that the "main channel of navigation" as a boundary principle had even a twilight existence in 1740, much less that such a boundary was ever denoted by the word "middle."[12] The United States insists that New Hampshire should be bound by the recitations in the 1976 consent decree which set the endpoint of the main channel at the midpoint of the lights on range line located between the 2KR whistling buoy and Odiorne's point.

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[10] The United States, unlike Maine, does not suggest that the Navy's 1814 decision apportioning the Navy Yard at Portsmouth to Maine has any relevance whatsoever to the construction of the 1740 decree. The United States appears to concede that Maine's attempt to derive a midchannel boundary from the Navy's apportionment of Dennett's Island to Maine is unfounded. The 1814 decision is the only basis for the Navy's decision to allow Maine to tax its civilian employees.

[11] *See* Table of Federal Documents Concerning Portsmouth Harbor, New Hampshire, App. at 3a.

[12] The principle of division suggested by the United States is based on actual current use rather than on hydrographic (e.g. the thalweg) or geographic (e.g. the thread of the river) principles, which are the only principles recognized by this Court as having an historical basis. The thalweg is defined as the "course down the stream, which is that of strongest current ....". 2 Aaron Shalowitz, *Shore and Sea Boundaries*, §1423, p.375 (U.S. Dept. of Commerce, 1962).

Whatever the 1740 Decree may mean, it cannot possibly have been intended to designate a location whose significance depends entirely on navigational aids installed more than a century later. As New Hampshire stated in its initial brief, the meaning of the terms and language in a decree cannot be established by a "rule of law declared long after its promulgation." *Vermont v. New Hampshire*, 289 U.S. at 604. It is irrefutable that a construction of the 1740 decree that places the boundary at the low water mark of the Maine shore and reflects what both New Hampshire and Massachusetts perceived to be New Hampshire's post-1740 territorial limits is more plausible than a boundary based on a modern navigational channel marked by range lights.

The United States, having no apparent interest in this matter, and merely assuming the validity of conclusory statements by Maine as to the proper inferences to be drawn from complicated historical circumstances, is not equipped to offer opinions on the plausibility or historical correctness of the several competing constructions of the 1740 decree. Ultimately, the United States appears to base its argument on the premise that even if the 1976 boundary is not historically justified, it is "less wrong" than the boundary that New Hampshire now claims along the Maine shore and for that reason alone should be accepted as "close enough." U.S. Brief at 20. A boundary that is only "close enough" should not be given preclusive effect in a case that implicates the geographical extent of New Hampshire's only deep water port, and which so profoundly affects the lives of thousands of civilian employees at the Portsmouth Naval Shipyard. Accordingly, New Hampshire has sought leave to present evidence to this Court to establish the true and correct location of its historical boundary with Maine.

II. THE 1976 CONSENT DECREE DOES NOT ESTOP NEW HAMPSHIRE FROM ASSERTING AN HISTORICALLY CORRECT BOUNDARY WITHIN THE MOUTH OF THE HARBOR AND UP THE PISCATAQUA RIVER.

Having given its imprimatur to Maine's historical conclusions without addressing New Hampshire's evidence, the United States asserts that this Court "need not resolve the States' competing views of history" and that "further development of the factual record" is unnecessary because the Court may "coupl[e]" the *res judicata* effect of the 1740 order with the 1976 consent decree to arrive at the conclusion urged by Maine. U.S. Brief at 14-15. This argument is blatantly circular. The consent decree can draw no additional force from being coupled with the 1740 order unless Maine's interpretation of the latter is correct, and it cannot be determined whether Maine's construction is correct without adequately analyzing the relevant historical evidence. Absent a resolution on the merits of the States' and the Master's "competing views of history," the question of the preclusive effect of the consent decree must be decided on the assumption that the underlying historical and legal principles are not correct.

Unlike Maine, which relies primarily on judicial estoppel and claim preclusion, the United States bases its argument exclusively on issue preclusion. The United States' reliance on issue preclusion fails because the United States has not, and cannot demonstrate the necessary prerequisite for issue preclusion, e.g., that Maine and New Hampshire intended the consent decree to have preclusive effect as to their inland waters.[13] Although the United States ac-

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[13] In arguing for issue preclusion based solely on a recitation in the 1976 consent decree, the United States fails to recognize the distinction between agreement on a legal rule for the purpose of settling a pending case, and agreement that such a rule will have preclusive effect as

knowledges that such intent is necessary to derive issue preclusion from a consent judgment, it points to nothing in either the text of the decree or the circumstances or the negotiations of the parties that demonstrates such intent.[14] While the United States argues that Maine and New Hampshire intended to be bound by the interpretation of the 1740 order based solely on the recitations in the decree itself, and bases its issue preclusion argument exclusively on the recitations in the decree, it makes no attempt to reconcile the obvious conflict in the recitation of the decree concerning the adoption of the Special Master's Report, which recommended division at the geographical middle, and the other recitations which use the navigational channel as delineated by the range lights to fix one end of the lateral marine boundary.[15]

Having no familiarity with the course of the proceedings in the lateral marine boundary case, or with the circumstances that compelled the states to seek entry of the consent decree, the United States simply concludes that the parties had no apparent reason to include a statement as to the meaning of the 1740 order, other than to bind themselves to the application of the same principles of division along other segments of the boundary. United States Brief

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[13] *Cont.*

to unasserted causes of action. It is clear that only the latter will set up issue preclusion: "Settlements ordinarily occasion no *issue preclusion* ... unless it is clear ... that the parties intend their agreement *to have such an effect*." *Arizona v. California*, __U.S.__, 120 S.Ct. 2304, 2319 (2000) (emphasis added).

[14] The United States was not a party to the lateral marine boundary case, and has no knowledge of the negotiations that led to the consent decree. Notably, Maine has declined to argue that the parties had any actual understanding that their agreement would bind them with respect to parts of the boundary not then at issue.

[15] The recitations in Paragraph 1 of the decree state, "The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of plaintiff and defendant is granted." U.S. Brief app. at 1a.

at 18-19. The United States' conclusions about the presumed intent of New Hampshire and Maine find no support in the record. As the record shows, New Hampshire and Maine did have other reasons and those reasons explain their intent in including the references to the 1740 order in the 1976 consent decree.

In 1973, when Maine and New Hampshire drafted the consent decree, both states wanted to establish a claim for the ownership of the marginal sea, which was then at issue in the case of *United States v. Maine, et al.*, 420 U.S. 515 (1975). *See* Report of Special Master Clark in *New Hampshire v. Maine*, No. 64, Original, at 45-47 (1975). The recitation in the consent decree that describes the 1740 order as the source of the boundary in the marginal sea appears to have been intended to support the states' claims to submerged lands off their coasts. As originally drafted and as approved by the respective Governors and Councils, Paragraph 2 of the consent decree stated that, "The source of the lateral marine boundary line ... lies in the Order of the King in Council of August 5, 1740, which Order provided: [remainder of paragraph as in final decree]." *See* Motion for Entry of Judgment by Consent of Plaintiff and Defendant, filed September 23, 1974 at 2. The recitation that the source of the boundary claim derived from the 1740 Order in Council was intended, at least in part, to support the argument made by the seaboard states in *United States v. Maine* that the colonies owned the marginal sea.[16] Sub-

[16] Another reason for including explicit references to the 1740 order in the consent decree is explained in the Plaintiff's Memorandum of Law in Support on Jurisdiction to Enter Consent Decree, in *New Hampshire v. Maine*, No. 64, Orig., filed about Oct. 15, 1974 (App. at 148a), in which New Hampshire attempted to distinguish *Vermont v. New York*, 417 U.S. 270 (1974) on the basis that the New Hampshire-Maine decree, unlike the proposed Vermont-New York decree, set forth the specific factual and legal principles on which it was founded. *Vermont v. New York* had been decided on June 3, 1974, just as the consent decree was being negotiated, and its implications concerned counsel for New Hampshire and Maine with respect to how the decree could be constructed so as to avoid

sequently, the source language was omitted from the decree, leaving the United States to speculate erroneously about the purpose for that paragraph.

While New Hampshire's lateral marine boundary case file contains considerable evidence showing the actual purposes intended to be served by the recitations in the decree, the file contains no evidence whatsoever supporting the United States' inference that the parties intended to establish preclusive principles for setting a boundary in Portsmouth Harbor and up the Piscataqua River.[17] The United States' inference of presumed intent is not credible given the complete absence of any reference to any such purpose or possible result (1) in any communications between the states' governors and legal counsel during the lateral marine boundary case, (2) in contemporaneous public statements concerning the nature of the settlement, and (3) in corre-

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[16] *Cont.*

a similar result. This concern was amplified by the presence of intervenors actively opposing the settlement, who did in fact object on the ground that such a case could not be compromised under *Vermont v. New York*. *See* Memorandum and Offer of Proof to Special Master, Mr. Justice Clerk, by Proposed Intervenors (December 11, 1974) at 18. The parties expected special master Clark to adopt their proposed decree in its entirety, as reflected by the provision in Paragraph 1 of the decree approving the special master's report. There is not a scintilla of evidence that either of the parties suggested inclusion of factual and legal principles in the decree with a view to determining the location of the boundary inside the harbor.

[17] Because the United States filed its brief shortly before this Court's scheduled consideration of this case at its January 5, 2001 conference, New Hampshire has been put to considerable difficulty in compiling documentary proof of the totality of the circumstances surrounding the negotiation of the consent decree. A selection of documents from the files of the New Hampshire Department of Justice and special counsel in the lateral marine boundary case reflects consistent and unvarying references to the settlement as resolving *only* the seaward or marine boundary. These documents are included in the Appendix at 47a-70a. These documents are on file with the New Hampshire Dept. of Justice.

spondence addressing the considerations that motivated the governors and councils of both New Hampshire and Maine to approve the settlement.

No argument can be raised that the lateral marine boundary case was filed to resolve any dispute, other than the one then pending concerning the location of the "offshore boundary."[18] New Hampshire filed the lateral marine boundary case only after the boundary commission, appointed under special legislation for the specific purpose of settling the offshore marine boundary, failed to reach agreement.[19] Mr. Richard Upton, who represented New Hampshire as special counsel, conducted boundary negotiations as member of the boundary commission. As the Special Master observed, "The controversy may well have been sparked by the continuing decrease in the size of the New England lobster catch in recent years." Special Master's Report, *New Hampshire v. Maine*, No. 64 Orig. (Oct. 8, 1975) at 5. Mr. Upton was charged with negotiating the boundary because he was, at the time, Chairman of the Fish and Game Commission.

In March of 1973, the Governor of New Hampshire instructed Mr. Upton concerning the position he was to take in further negotiations regarding the "lateral marine boundary," and in May, the Governor further instructed the New Hampshire attorney general concerning the filing of a case

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[18] *See* ch. 564, 1973 Laws of N.H. 1104. The boundary commission was appointed to resolve the "common lateral marine boundary between the State of New Hampshire and the State of Maine, and the State of New Hampshire and the commonwealth of Massachusetts ...." The inclusion of boundary commissioners from Massachusetts on the boundary commission confirms that the only matter in dispute involved the *offshore* boundaries.

[19] *See* letter of Governor Kenneth Curtis to Governor Meldrim Thomson, Feb. 6, 1973, App. 47a. *See also* ch. 58, 1973 Laws of N.H. 38 (joint resolution rejecting U.S.G.S. lateral marine boundary); ch. 580, 1973 Laws of N.H. 1124, App. 44a (law defining lateral marine boundary until otherwise determined by interstate compact or judgment of Supreme Court).

in this Court "seeking establishment of our rightful maritime boundary."[20] The Governor of Maine, in acknowledging receipt of New Hampshire's complaint, described the case as involving "the seaward boundary between the two states."[21] Although the boundary commission suspended its activities after New Hampshire filed suit, Maine confirmed a proposal in 1973 to resume negotiations concerning the "marine boundary."[22]

After the states reached agreement on the specific division of lobstering grounds in the marginal sea off their coasts, the language used to describe their agreement consistently and exclusively referred only to the resolution of the lateral marine boundary. In June 1974, the Maine Attorney General's Office approved a news release stating that the states had reached "a tentative agreement for settlement of the marine boundary line dispute," and that the states had agreed to submit a motion for entry of consent decree "which would specify the precise marine boundary line ...." The release described the settlement as resolving the marine boundary "*commencing in the vicinity of Fort Point, New Hampshire and Fishing Island, Maine ....*" (emphasis added)[23] The New Hampshire governor and council approved the proposed settlement by a resolution that describes the location of the lateral marine boundary "from Portsmouth Harbor on the mainland to Gosport Harbor in the Isles of Shoals."[24] The resolution of the Maine governor

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[20] Letter from Governor Meldrim Thomson to Richard Upton, March 22, 1973, App. 49a; letter from Governor Meldrim Thomson to Warren Rudman, May 31, 1973, App. at 50a.

[21] Letter from Governor Kenneth Curtis to Deputy attorney general David Souter, June 8, 1973, App. at 51a.

[22] Letter from Charles Larouche to David Souter, July 9, 1973, App. at 52a.

[23] Attachment to letter from Charles Larouche to David Souter, June 24, 1974, App. at 55a.

[24] Resolution Concerning Settlement of the Lateral Marine Boundary Dispute Between New Hampshire and Maine, June 26, 1974, App. 60a.

and council includes a similar recital and makes reference to the map, submitted with the consent decree, that shows the proposed settlement line as beginning in the vicinity of Fort Point and Fishing Island. By letter to the special master, the Maine attorney general stated that the states had reached a settlement "of the marine boundary line dispute."[25]

The filings docketed with this Court and with the special master confirm the states' understanding of the limited scope and effect of the settlement. Maine's 1974 Brief in Opposition to Motion to Intervene (App. 71a, 77a) states, "The only property involved in this action is that which lies beneath the water in the disputed area." New Hampshire's Brief in Opposition to Motion to Intervene (App. 81a, 87a) likewise states that "the proposed boundary line *as it leaves Piscataqua Harbor* follows the center of the channel of navigation." (emphasis added). As noted in New Hampshire's previous brief, the line as marked on the United States Coast & Geodetic Survey nautical chart, conforming to the map annexed to the decree, shows a line beginning at the entrance to the harbor in the vicinity of Fort Point and Fishing Island and running seaward. *See* N.H. Map Lodging at p. 25; N.H. Brief in Opp. at 23. At no point during the negotiation or approval of the settlement is there any reference that would support either a presumption of intent on the part of New Hampshire and Maine to be bound in the inland waters by the application of a specific principle of division, or a presumption that the Court actually adjudicated the historical validity of the recitations underlying the consent decree. This is confirmed by Mr. Bradley's (counsel for Maine) statement at oral argument, in response to a question concerning the principles to be

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[25] Letter from Charles Larouche to Richard Upton, July 10, 1974, with attached letter from same to Hon. Tom Clark, July 10, 1974, Order in Council, July 10, 1974, and letter from John Lund to Hon. Kenneth Curtis and Hon. Harvey Johnson, June 20, 1974, App. at 66a, 67a, 70a.

applied in determining the location of the boundary, that there had been no "proper development of the case at this point to determine whether you can disagree with us. I have suggested two things today that weren't even mentioned before the Special Master." *See* Transcript of Oral Argument at 42, App. at 100a, 141a; *see also,* N.H. Brief in Opp. at 21-22.

In fact, as the United States acknowledges, the consent decree does not even establish the range line, the only portion of the line based on the principle of division by a channel of navigation as a boundary. Rather, the "range line" is used simply to fix one end of the lateral marine boundary at the point where the "main channel of navigation terminates at the mouth of the river, and then runs the boundary from that point to the navigation channel in Gosport Harbor in the Isles of Shoals." U.S. Brief at 9.

The United States argues that the parties could not have intended to create a "discontinuous" line by adopting a principle for locating the boundary at the entrance of the harbor that would not apply to the inland waters of the harbor and the Piscataqua River. There is, however, no reason to assume the parties considered this issue. As described in the consent decree, the location of the lateral marine boundary was determined by principles of international law. To the extent that the line used to derive the starting point for the lateral marine boundary is itself treated as a boundary, this Court, in its equitable discretion, can determine the proper location for the segment linking that line to the true inland boundary. As a practical matter, Maine's assertion that the boundary in the harbor follows the thalweg would result in an equally discontinuous line, given that the location of the thalweg differs from the line of the modern navigational channel from which the endpoint of the lateral marine boundary was derived in 1976. As noted by the dissent in *New Hampshire v. Maine*, 426 U.S. 363, 372 (1976), "What the parties have actually

done is to agree upon a line which they assert represents the course most usually followed by those navigating the harbor and the river. *This is not at all the same thing as a boundary following the thalweg*" (emphasis added).

III. THE NEW HAMPSHIRE ATTORNEY GENERAL LACKED AUTHORITY TO SETTLE NEW HAMPSHIRE'S BOUNDARY IN PORTSMOUTH HARBOR AND THE PISCATAQUA RIVER

The United States' assertion that the New Hampshire attorney general's negotiation of a consent decree in the lateral marine case binds New Hampshire with respect to its inland waters also cannot be reconciled with the limited authority accorded the New Hampshire attorney general to settle the lateral marine boundary case.[26] Consent decrees are binding in subsequent cases on different causes of action only in accordance with contractual principles. Restatement of Judgments, 2d, §27; *see also*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-38 (1975) (consent decree construed as contract); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 993 (5th Cir. 1977), *reh. den.* 656 F.2d 1215, *cert. den.* 436 U.S. 944 ("The presumption is that an issue resolved by stipulation or concession in one suit is not conclusively established in a subsequent suit on a different cause of action unless it is clear that the parties so intended").

The New Hampshire attorney general claimed no authority, and had no authority, to enter into any agreement in the lateral marine boundary case that would have determined the location of the boundary outside the area then in dispute. At all times in the 1976 litigation, the New

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[26] *See Opinion of the Justices* 373 A 2d 647 (1977). (The Attorney General was authorized to enter the consent decree because it involved the settlement of pending litigation which had been authorized by the New Hampshire General Court to determine the lateral marine boundary).

Hampshire attorney general asserted that his authority, and that of the governor and council, to enter the consent decree derived solely from the pending litigation.[27] This Court acknowledged the limited scope of the attorney general's authority in a footnote to its opinion in the lateral marine boundary case. While noting that the New Hampshire legislature supported a different marine boundary, this Court quoted the attorney general's statement that "the requested disposition of this action" had been approved by the Governor and Council, and commented: "No contention has been made that under New Hampshire law legislative approval or disapproval renders the New Hampshire consent ineffective." *New Hampshire v. Maine, supra* at 365, n.3. The endorsement by this Court of the implicit assumption made by the United States that the attorney general had authority in 1976 to bind the state of New Hampshire to principles to be applied in determining the location of portions of its boundary with Maine not then in litigation would have profound implications as to the possible loss of primary aspects of state sovereignty without due consideration by political authorities, and would raise a Compact Clause issue of whether a state boundary, not involved in litigation, may be settled by the attorney general, without legislative or congressional approval. Such questions may be avoided by recognizing that neither the Maine nor New Hampshire attorneys general intended to enter into any agreement that would preclude their claims regarding inland waters.

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[27] *See* Plaintiff's Memorandum to the Special Master (filed March 1975), noting the legislature's disapproval of the settlement, and citing references to authority of attorney general to settle and compromise suits and proceedings, and Governor and Council's "full control of all litigation in which the state is engaged, in the first instance." (App. 144a, 146a).

CONCLUSION

The Court should deny Maine's Motion to Dismiss and rule that *res judicata* does not bar New Hampshire's claim to its historic boundary. New Hampshire asks that this Court appoint a Special Master to hear the evidence.

Respectfully submitted,

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